In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 169

TERRY I. BLUE, PETITIONER

v.

DOUGLAS MCKAY, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1–2) is not yet reported. The opinion of the District Court (Pet. App. 3–19) is reported at 136 F. Supp. 315.

JURISDICTION

The judgment of the Court of Appeals was entered on April 12, 1956 (Pet. App. 1). The petition for a writ of certiorari was filed on June 15, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Mexico ceded a large territory to the United States in 1848 by the Treaty of Guadalupe Hidalgo. Thereafter, by Act of March 3, 1851, 9 Stat. 631, Congress provided for a board of commissioners "to ascertain and settle" all claims "of any right or title derived from the Spanish or Mexican government" in California and for appellate review by the local federal district court and by this Court. It further provided for a patent by the United States to claimants whose titles were thus settled. Lands as to which claims were not validated became property of the United States. The question presented is as follows:

Whether a decree of the board, affirmed by the district court, confirming a claim to a Rancho (derived from an original Spanish grant) in "fee simple," and a patent by the United States issued in 1858 pursuant to that decree, operated to establish that the United States had no interest in the land, including the minerals.

STATUTE INVOLVED

Relevant portions of the Act of March 3, 1851, 9 Stat. 631, are set out at pp. 20–24 of the Appendix to the petition.

STATEMENT

Petitioner instituted this suit to compel the Secretary of the Interior to grant petitioner's application for an oil and gas lease on certain land in Los Angeles County, California, pursuant to the Mineral Leasing Act of February 25, 1920, 41 Stat. 437, 441, 30 U. S. C. 181, 226 (Pet. App. 3). To support the requested

mandatory relief, petitioner seeks a declaratory judgment that the United States owns the minerals in that land, which was ceded by Mexico and later patented by the United States to parties who claimed under a prior Spanish grant (Pet. App. 3). The relevant facts are as follows:

The Mexican war was concluded by the Treaty of Guadalupe Hidalgo on February 2, 1848, 9 Stat. 922. In that treaty a cession was made of a very large territory including all of the present State of California. Under the treaty provisions, the land titles of individuals within the ceded territory were protected. Land owned by the Mexican government and land as to which no valid private claim could be established belonged to the United States. The number of claimants and the type of Spanish and Mexican grants were many and varied. These facts required some procedure for ascertaining the validity, quantum and boundaries of the private claims in order to set apart the lands privately owned from those which belonged to the United States. To accomplish this, Congress passed the Act of March 3, 1851, 9 Stat. 631, entitled "An act to *ascertain and settle* the private Land Claims in the State of California."[1]

That Act established a board of commissioners "for the purpose of ascertaining and settling" all private land claims, empowered it "to decide upon the validity" of such claims, and provided that the board's findings could be appealed to the district court and thence to this Court. Section 13 provided that in all

[1] Italics added throughout this brief.

of surveyor of the public lands for the State of Louisiana," approved third March, one thousand eight hundred and thirty-one: *Provided, always,* That if the title of the claimant to such lands shall be contested by any other person, it shall and may be lawful for such person to present a petition to the district judge of the United States for the district in which the lands are situated, plainly and distinctly setting forth his title thereto, and praying the said judge to hear and determine the same, a copy of which petition shall be served upon the adverse party thirty days before the time appointed for hearing the same. *And provided further,* That it shall and may be lawful for the district judge of the United States, upon the hearing of such petition, to grant an injunction to restrain the party at whose instance the claim to the said lands has been confirmed, from suing out a patent for the same, until the title thereto shall have been finally decided, a copy of which order shall be transmitted to the commissioner of the general land office, and thereupon no patent shall issue until such decision shall be made, or until sufficient time shall, in the opinion of the said judge, have been allowed for obtaining the same; and thereafter the said injunction shall be dissolved.

* * * * *

SEC. 15. *And be it further enacted,* That the final decrees rendered by the said commissioners, or by the District or Supreme Court of the United States, or any patent to be issued under this act, shall be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons.

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instances where claims were rejected by the commission or courts or were not filed within two years the lands "shall be deemed, held, and considered as part of the public domain of the United States." It further provided that "for all claims finally confirmed by the said commissioners, or by the said District or Supreme Court, a patent shall issue to the claimant upon his presenting to the general land office an authentic certificate of such confirmation, and a plat or survey of the said land * * *." Section 15 provided that "any patent to be issued under this act, shall be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons."

Pursuant to that Act, several heirs and purchasers from heirs of one Christobel Dominguez presented to the commissioners in the year 1852 a "claim in fee simple" to 10 square leagues of land known as the Rancho of San Pedro (Pet. App. 6, 7). They asserted that Christobel Dominguez and his successors were "seized in fee thereof" under an original Spanish grant which had been ratified by the Mexican government (Pet. App. 7). The commissioners ruled that the claim was valid and entered a decree confirming it (Plaintiff's Exhibit 4). On appeal by the United States, the District Court ruled that "the claim * * * is good and valid" and affirmed the decree of the commissioners on February 10, 1857 (Pet. App. 8).[2] Thereafter, following a survey, a patent of

[2] An appeal taken to this Court was withdrawn on June 4, 1857 (Plaintiff's Exhibit 5).

the United States was issued to the claimants on December 18, 1858, granting the area claimed in the words and form of a common-law fee simple estate (Pet. App. 8–9).

The matter thus rested until petitioner in this action applied, on February 26, 1937, for an oil and gas lease on some of the lands (not exceeding 640 acres) included in the Dominguez patent. This application, along with applications by 26 other persons for leases on similar tracts, was rejected by the Secretary of the Interior on the ground that the land was "embraced in confirmed private land claims, title to which has long since passed from the Government by patent. The Department has no further jurisdiction over these lands, and no authority to issue an oil and gas lease covering the same" (Defendant's Exhibit 1). Following a rehearing, the application was again denied on April 8, 1949, and a request for reconsideration was refused on July 12, 1949.

This suit was filed by petitioner on April 16, 1952 (Pet. App. 10). Following a trial, the District Court entered judgment in favor of the Secretary and dismissed the complaint. The court held that petitioner's contentions "run counter to a long line of authorities which either directly or indirectly support a contrary view and would do violence to the purpose of the Act of March 3, 1851, to settle private land claims in the State of California based on Mexican or Spanish grants and not to leave such titles in their former indefinite position" (Pet. App. 13–14). The Court of Appeals affirmed *per curiam,*

stating that the opinion of the District Court "in our judgment, correctly disposes of the case" (Pet. App. 1–2).

ARGUMENT

The issue presented by this case has long been settled against the petitioner's contentions. He argues that the people of the United States should not "be deprived of valuable property rights and their oil producing income by a failure of the Courts of the United States to pass upon them" (Pet. 9). But the courts of the United States years ago passed upon those rights. The issue thus becomes merely whether petitioner can collaterally attack the judgments of those courts. That issue has also been decided by this Court, adversely to petitioner.

In this case the patentees had repeatedly asserted "that they claim in fee simple" title to the land involved (Pet. App. 6–7; Plaintiff's Exhibit 1), and they asked confirmation of *that* title. They asserted that their fee simple title derived from "both the Spanish and Mexican Governments" (Plaintiff's Exhibit 1). The opinion of the board ordered entry of a decree "in general terms confirming the title of the petitioners" (Pet. App. 7), and a decree adjudging "that the *claim* of said petitioners is valid" was entered (Plaintiff's Exhibit 4). On appeal, the district court took additional evidence, and, thereafter, affirmed the decree of the board, finding "the *claims* of the appellees to the land claimed in this case * * * good and valid" (Pet. App. 8). The patent issued pursuant to the decree was in terms of a fee simple title (Pet. App. 8–9).

Plainly, the proceedings and the decree must be regarded as relating to "the claim asserted." *Brown* v. *Brackett,* 21 Wall. 387. By its patent, issued pursuant to a decree of confirmation, "the government declares that the *claim asserted* was valid under the laws of Mexico * * *." *Beard* v. *Federy,* 3 Wall. 478, 492. In *Thompson* v. *Los Angeles Farming, etc. Co.,* 180 U. S. 72, it was contended that a decree of confirmation under the 1851 Act and the patent issued were utterly void because the papers used to support the claim showed that the Mexican government lacked authority in law to convey mission lands, so that no title could have been "derived from the Spanish or Mexican government." This Court rejected the contention, stating (pp. 77–78):

> They [the provisions of the 1851 Act] made a special tribunal of the board limited to hear a particular class of claims, but not limited to the questions of law and fact which could arise in passing on and determining the validity of any claim of the class. The power to consider whatever was necessary to the validity of the claim—the propositions of law or propositions of fact—the fact of a grant, or the power to grant, was conferred. If there should be a wrong decision the remedy was not by a collateral attack on the judgment rendered. The statute provided the remedy. It allowed an appeal to the District Court of the United States, and from thence to this court. Legal procedure could not afford any better safeguards against error. Every question which could arise on the title claimed could come to and receive judgment from this court. The scheme of adjudication was made complete and all

> the purposes of an act to give repose to titles were accomplished. And it was certainly the purpose of the act of 1851 to give repose to titles. It was enacted not only to fulfill our treaty obligations to individuals, but to settle and define what portion of the acquired territory was public domain. It not only permitted but required all claims to be presented to the board, and barred all from future assertion which were not presented within two years after the date of the act. Sec. 13. The jurisdiction of the board was necessarily commensurate with the purposes of its creation, and it was a jurisdiction to decide rightly or wrongly. If wrongly a corrective was afforded, as we have said, by an appeal by the claimant or by the United States to the District Court. Sec. 9. Indeed, the proceedings in the District Court were really new, and further evidence could be taken. Sec. 10. Upon the confirmation of the claim by the commissioners or by the District or Supreme Court, a patent was to issue and be conclusive against the United States. Sec. 15.

Similar expressions of the scope and finality of confirmation proceedings under the 1851 Act appear in many other decisions. *E. g., Botiller* v. *Dominguez*, 130 U. S. 238, 249; *United States* v. *Coronado Beach Co.*, 255 U. S. 472, 487; *Hogan* v. *United States*, 72 F. 2d 799, 804–805 (C. A. 9.).[3] The same rule has been

[3] In *Brown* v. *Brackett*, 21 Wall. 387, 389, this Court said concerning the 1851 Act: "Every conceivable point respecting these grants, their validity, their extent, and the operation of decrees confirming claims to land under them, has been frequently examined; and the law upon these subjects has been repeated even to wearisomeness."

applied in decisions respecting similar provisions in other acts. *Langdeau* v. *Hanes,* 21 Wall. 521; *Interstate Land Co.* v. *Maxwell Land Co.,* 139 U. S. 569, 580; *Joplin* v. *Chachere,* 192 U. S. 94, 104; *Ely Real Estate & Investment Co.* v. *Watts,* 262 Fed. 721 (C. A. 9).

Section 15 of the 1851 Act provided that "the final decrees * * * or any patent to be issued under this act, shall be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons." The effect of that Section in binding such persons as petitioner has long been settled. In *Beard* v. *Federy,* 3 Wall. 478, 493, this Court held that the "term 'third persons,' as there used, does not embrace all persons other than the United States and the claimants, but only those who hold superior titles, such as will enable them to resist successfully any action of the government in disposing of the property." And in *United States* v. *O'Donnell,* 303 U. S. 501, 512, the Court stated that "it has been consistently held that claimants under the United States, by virtue of statutes disposing of its public lands in California, are not 'third persons' within the meaning of the Mexican Claims Act, and that confirmation under that act of claims under Mexican grants is conclusive upon all those claiming under the United States." See also *Hogan* v. *United States,* 72 F. 2d 799, 806 (C. A. 9). Thus, in the present case, petitioner, who merely applied in 1937 for an oil and gas lease under the Mineral Leasing Act of 1920, has no superior title, and seeks, at most, to

be a claimant under or in privity with the United States. It follows that Section 15 bars his claim.

The identical contention urged by petitioner here, that title to minerals did not pass under a patent issued pursuant to the 1851 Act, was rejected in 1861 by the Supreme Court of California in *Moore* v. *Smaw,* 17 Cal. 199. Contrary to petitioner's assertions (Pet. 8–9), the ruling as to the effect of the patent was not dictum. The case authoritatively decided that a patent granting a fee simple estate included the minerals. That decision by Chief Justice Field, who later served on this Court, has never been questioned by any court. It has been in force and relied upon for almost 100 years. See also *Delassus* v. *United States,* 9 Pet. 116. "Where questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be considered open. Such decisions become rules of property, and many titles may be injuriously affected by their change." *Minnesota Co.* v. *National Co.,* 3 Wall. 332, 334.[4]

Petitioner's assertion of a conflict with decisions of this Court (Pet. 10–12) is without merit. All the decisions upon which he relies hold that confirmation vests the title claimed to the full extent recited in the decree. Confirmation does not enlarge the original grant, but adjudicates and defines the grant with

[4] Other cases have been decided on the presumption that title to the minerals passed by patents from the United States under the 1851 Act. *United States* v. *San Jacinto Tin Co.,* 125 U. S. 273; *Los Angeles & Salt Lake Railroad Company* v. *United States,* 140 F. 2d 436 (C. A. 9), certiorari denied, 322 U. S. 757.

finality in terms of American law. *Boquillas Cattle Co.* v. *Curtis,* 213 U. S. 339. That settled, plainly salutary, rule defeats petitioner's claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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DOUGLAS McKAY, Secretary of the Interior,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

REPLY FOR THE PETITIONER TO OPPOSITION OF RESPONDENT

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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ERROR IN RESPONDENT'S STATEMENT

In a very short opposition brief Respondent has crowded a substantial number of substantial errors. We reply as follows:

The over-all purpose of the Statute of March 3, 1851 was to implement the Treaty of Guadalupe Hidalgo.

The end in view was to secure from the new Sovereign, in favor of landowners, the same recognition of the same titles which the landowners enjoyed under the former Sovereign. The Act purported to do no more than this. It adopted "confirmation" as the appropriate means to accomplish it. It empowered its officials to do no more than to *confirm*. The words "*to convey*" are not to be found in the Statute. It restricted claims to those deduced from the Spanish or Mexican Government.

Respondent, however, asserts that hidden away in the Statute or implied from an erroneous amplification of the caption is the concealed *grant* of power to United States officials to *convey* to claimants parts of the public domain of the United States never owned by them under the former Sovereign: This is a patent absurdity.

Thus, Respondent seeks to enlarge the legislative grant of the power *to confirm* into the power *to convey* as well and to have it receive judicial approval.

ERRORS IN RESPONDENT'S ARGUMENT

On page 6, Respondent asserts that "The Patent issued pursuant to the decree was in terms of a fee simple grant". *This is not true.* The recitals in the Patent setting forth the confirmatory proceedings use the words "confirm" and "confirmation" throughout.

The land is described and then that particular land is granted to claimants "in the respective shares, and proportion which they hold the premises by title deduced from Cristoval Dominguez . . . " Thus, it becomes necessary to determine what Cristoval Dominguez owned under Mexican law in order to ascertain what was *confirmed.* The *confirmatory* decision and decree show it to be only a Rancho. **No mine or minerals were involved.**

U. S. Patents of Conveyance and of Confirmation are couched in the same general form and phraseology. Respondent implies that there is a difference and that a grant of fee simple title can be deduced from the choice of the form used. This is entrapment pure and simple. The patent wording is the same whether "*confirmation*" or "*conveyance*" is intended.

Construction is to be derived from the stated *purpose* of the patent, not from the archaic words of the common law, which still survive in our forms of conveyance. The many deeds absolute on their face which are construed to be mortgages when such is shown to be their *purpose* illustrate this legal commonplace.

Words out of context from *Brown vs. Brackett,* 21 Wall 387, 22 Law Ed. 622, are next used to show

that the "decree" is "related" to the "claim". Of course there exists a relationship, but Respondent claims an identity. His argument is that the Dominguez claimants used the words "in fee" in the claim and that therefore the words "in fee" must be read into the decision and decree. This involves the absurdity that when the award in the decree conflicts with the "claim", it is the "claim" and not the decision and decree that should prevail.

We should look in the Decision of the Board and in the Decree of the Court affirming it for information as to what was decided. We should not try to stretch or enlarge the decision by reference to inappropriate phraseology found only in the claimant's Petition.

The *judgment* in a case provides the amount of the award, *not* the *prayer* of the *complaint*. The Attorney General either knows this or he does not. If he does not know it, he is lacking in fundamental legal knowledge. The presumption is the other way. Therefore, he owes a duty to the court to call attention to the true rule and not espouse an error which would despoil those whom he, as Trustee, is sworn to protect: i.e., the people of the United States. The only way the Government can win this case is for the attorney-general to lose it. Thus a billion dollars worth of property will revert to its true owners—the United States—just as did the tidelands.

Respondent next quotes and presents as the law two cases which have been criticized and overruled by

a subsequent decision of the Supreme Court: *Beard vs. Federy,* 3 Wall 478, 70 U.S. 174, 18 Law Ed. 88, and *Thompson vs. Los Angeles Farming and Milling Co.,* 180 U.S. 72, 45 Law Ed. 432. They quote the same rule. The latter case is largely a quotation from the former. The rule is that a patent to confirm is "a quitclaim or rather a conveyance" as well as a confirmation.

Boquillas Cattle Co. vs. Curtis, 213 U.S. 339, 53 Law Ed. 822, specifically *disapproves* of *Beard vs. Federy* (supra) and holds to the contrary that the patent issued in a confirmatory proceeding is not a conveyance but rather a "confirmation in the strict sense".

Mr. Justice Holmes in the Boquillas case states "It is not to be understood that when the United States executes a document on the footing of an earlier grant by a former sovereign it intends or purports to enlarge the grant".

Respondent counsel in this case purports to do just what Mr. Justice Holmes held should not be done in the above case.

It is difficult to understand why Respondent quotes the *Boquillas* case (supra) as upholding his contention when it holds the exact opposite.

For the sake of easy comparison of the litigation concerning the *Boquillas* case (supra) and this case, the important features are arranged side by side in parallel columns. Our case will be referred to as Dominguez Grant, the other as Boquillas Grant.

Facts in Boquillas Grant

1. Original title from Mexico
2. Sovereignty cede to U. S.
3. Statutory procedure for confirmation of private titles existing at cession set up
4. Claimants filed claim and secured decree of confirmation
5. Mexican title did not include water rights
6. Water rights vested in U. S. by cession

Patentee Claimed:

Patent of confirmation from U. S. constituted a new source of title to water rights from U. S. to Patentee

Court Decision:

Supreme Court holds "no". Patent is a confirmation only "in the strict sense". Water rights remain in U. S.

Facts in Dominguez Grant

1. Original title from Spain and Mexico
2. Sovereignty cede to U. S.
3. Statutory procedure for confirmation of private titles existing at cession set up
4. Claimants filed claim and received decree of confirmation
5. Mexican title did not include mineral rights
6. Water rights vested in U. S. by cession

Patentee Claimed:

Patent of confirmation from U. S. constituted a new source of title to mineral rights from U. S. to Patentee

Court Decision:

U. S. Court of Appeals holds "yes". Patent is a conveyance by U. S. to patentee of a new title to mineral rights under which mineral rights passed to patentee from the United States

In neither case did the Statute which set up the procedure to *confirm* Mexican titles existing at cession confer on any U. S. official the *power to convey* anything. The sole purpose of the statutes in both instances was *to confirm* old Mexican titles. The Court of appeals enlarged the law.

MOORE vs. SMAW (17 Cal. 199)

Respondent quotes the rather testy observation of the late Mr. Justice Field in *Brown vs. Brackett* (supra) that

> "Every conceivable point respecting these grants, their validity, their extent and the operation of decrees confirming claims of land under them, has been frequently examined and the law upon these subjects has been repeated even to wearisomeness".

This querilous outburst of the author of *Moore vs. Smaw* (17 Cal. 199) is neither decorous nor true. It is unfortunately the assertion of a jurist trying to protect a wrong *State Court* decision made in his youth. He did not point to a single *Federal Court* case which decides the point presented in this case. The Attorney General has pointed to none and has admitted that none existed in his brief on appeal. The decision for which review is sought herein states that no precedent exists, the Court stating in the opinion approved *per curiam* on appeal,

> "While the precise issue raised in this pending suit appears not to have been raised in any prior litigation in any Federal Court so as to be directly passed upon, the *Moore* decision (*Moore vs. Smaw, supra*) has never been questioned and it has been cited with approval in other cases although not with respect to the issue involved in this proceeding".

Thus, California's *Moore vs. Smaw* (*supra*) is the sole case in point presented in the Brief of Respondent and in the Decision which is sought to be reviewed.

The cases from 1861 to 1897 which seek by *dicta* and misuse of legal terms, to uphold the doctrine of *Moore vs. Smaw* (*supra*) were largely written by Mr. Justice Field.

Beard vs. Federy (*supra*).

Brown vs. Brackett (*supra*), both of which are cited by Respondent, are cases in point.

Mr. Justice McKenna's decision in *Thompson vs. L. A. Farming and Milling Co.* (*supra*) is principally a long quotation from *Beard vs. Federy* (*supra*).

Mr. Justice Field protected his *Moore vs. Smaw* (*supra*) case during his long term on the Supreme Court of the United States, lasting as it did for over a third of a century. During that time the reports show that he wrote the opinions in the principal cases involving California Titles and when he did not joint the majority he occasionally wrote *dictum* into concurring opinions in which he sought to implement his old project in California by inserting helpful assertions into the literature of the Supreme Court.

That land frauds in California were matters of common knowledge is shown by the following official activity:

Early in 1858 Attorney General Black addressed a sharp message to the Congress concerning California land frauds and demanded action. He stated:

> "It must be remembered that the grants in most of these fraudulent cases are skillfully got up and were supported by the positive oaths, not merely by obscure men—but also by the testimony of distinguished persons who had occupied high social and political places under the former government". House Ex. Doc. 84, 36th Congress. 1st Session, pp. 31-32.

As a result Congress passed on May 18, 1858

> "An Act for the Prevention and Punishment of Frauds in Land Titles in California". XI Stats. at Large, pp. 290-291.

It is urged by Petitioner that the purported decision in *Moore vs. Smaw* (*supra*) is dictum. Respondent says it is decision and not dictum. This Court should decide this important issue.

Petitioner has examined the Record on Appeal in *Moore vs. Smaw*. Respondent had not done so prior to argument in the Court of Appeal and the statement in the Brief in Opposition that it is "decision" and necessary to the decision in the case impels one to the opinion that no examination of the Record on Appeal has yet been made by Respondent. If so, his statement is the mere assertion of a person uninformed on the subject matter.

The *Moore vs. Smaw* case did not involve title to real estate. It was an action to recover the value of gold bullion of the value of about $400. The judgment was for that amount. Title in fee simple to the land involved was stipulated by both parties to be in the

plaintiff Moore. This fact is ascertainable from the record on appeal in that case. A copy of said stipulation is as follows:

In Dist. Court 15 Jud. Dist.

STATE OF CALIFORNIA,
County of Butte
R. B. Moore, Plaintiff
vs.
John E. Smaw, Defendant

STIPULATION AS TO ADMISSION

In the above entitled cause it is hereby stipulated by and between the parties hereto, that for the purposes of this action, it shall be admitted on part of Deft. that Ptff. is the owner in fee simple of the land set out and described in his said complaint, and on part of Ptff. that Deft. entered upon said land under license from the State of California, and also from the government of the United States, said Deft. contending that such license gave a right to enter and to mine for, and extract gold from said land, which right Ptff. denies.

P. A. McRae, Atty. Ptff.
W. H. Rhodes, Atty. Deft.

Endorsed: In Dist. Court Butte County, Moore vs. Smaw

Stipulation filed April 2, 1860, Wm. Phipps, Clk. by C. G. Lincoln, Depy.

The only question before the court in that damage action was whether a license from the State of California or the General Mining Laws of the United States gave a prospector the right to enter land owned in fee simple by a private party and extract gold. Therefore, the question of how the plaintiff or his predecessors got the fee simple ownership was not necessary for a decision. Mr. Justice Field by a completely volunteer statement injected into the case the discussion as to whether or not a former Patent of Confirmation conveyed the minerals, admittedly owned at that time by the United States, into the case. Regardless of the Judicial morals involved, it resulted in presenting by a pretended decision a statement of law into the literature of the court which, though purely a volunteer dictum, has masqueraded as a decision for over ninety years. The decision complained of herein is based on this dictum which the court below regarded as a decision. Respondent, by observing that it has been in existence for nearly one hundred years, is offering the absurdity that dictum becomes decision by lapse of time. This is directly opposed to the Tideland case which holds that considerations of time, laches and estoppel do not apply when the sovereign's interest is involved. *U. S. vs. California,* 332 U.S. 14, 91 Law Ed. 1889.

Respondent hence asks the court to deny the petition for reasons in conflict with a recent decision of this honorable court. If this is to be done, it should be done openly. This startling change in the decisions of the court should be openly avowed in a hearing and

a written opinion. It should not lurk in the darkness and anonimity of the word "denied" where few, if any, may find it, though it, together with a mere *per curiam* statement, remain a pitfall to entrap the innocent and impair the rights of the uninformed.

The progress of Jurisprudence in the last twenty-five centuries has been away from a *lex non scripta* and toward the greater safety of a written code and toward the protection of the written decisions of our courts, easily found in the reports and the digests and the indices.

U. S. OFFICIALS LACKED THE POWER AND THE JURISDICTION TO CONVEY, UNDER ACT OF MARCH 3, 1851.

The Act of March 3, 1851 limits the jurisdiction of the officials as to person and subject matter in Confirmatory Proceedings. Sec. 8 of said Act limits the claims to be acted upon to

> " . . . persons claiming lands in California by virtue of any right or title derived from the Spanish or Mexican Government".

There is no claim here that the title to minerals "derived from the Spanish or Mexican Government". *Moore vs. Smaw* (*supra*), the later decisions of the Supreme Court in relation to titles of confirmation under the Act of 1851 (*supra*), as well as the argument of Respondent all agree that the title to minerals passed from the Mexican Government to the United

States Government by cession, but that the confirmatory patent constitutes "a new source of title to the minerals from the United States to the patentee".

Thus, the "new source of title" was not subject matter with which U. S. officials in Confirmatory proceedings and Patents of Confirmation had jurisdiction to deal. Their jurisdiction was limited to titles derived from the Spanish or Mexican Government. **Thus, the U. S. officials who issued the Patent of Confirmation in this case to the Dominguez heirs belonged, so far as minerals were concerned, to that classification of officials referred to in U. S. vs. California, 332 U.S. 19, as "officers who have no authority at all to dispose of Government property . . . " Such officers, the court goes on to say " . . . cannot by their conduct cause the government to lose its valuable rights by their acquiescence, laches or failure to act".**

PUBLIC POLICY vs. LAW

It is admitted that the amount involved in this case is large. It probably exceeds a billion dollars. Petitioner will receive nothing by a victory, save the right to have his application for an oil lease reconsidered in the light of the law declared in this case, and the right and privilege and pleasure of a taxpayer in having restored by this court's decision property to the United States worth a billion dollars. His application (although it ought to be granted) may well be denied again if he wins, but not for the *wrong reason* upon which the present denial is based. The issue, however, of whether the government of the United States owns the minerals under the Dominguez Grant or whether the heirs and assigns of the Dominguez claimants own them is presented to a Federal Court and to this Supreme Court for the first time in history, and presents an important question of law, equal to that of the Tidelands, which has not been, but should be decided by this Honorable Court.

It is understandable that the Attorney General, for reasons of policy, believes that present assumed titles be not disturbed. It is understandable that he so argue before the Supreme Court of the United States, viewed solely as a legal proposition. But why he uses overruled cases and bad logic, and why he refers to a case which holds against him as supporting his position, and why he takes a position opposite to that taken by the Government and decided by this Honorable Court in the Tidelands case (supra) for the purpose of pre-

venting the rights of petitioner and those of the people of the United States from being heard by the highest court in the land is not legally understandable. Viewed solely under the standard of political considerations, all becomes clear. To paraphrase Coke, let politics prevail though the heavens fall.[1] Viewed solely under the standard of legal considerations, the government's course creates an inexplicable perplexity. Its course is not reasonably appropriate for a legal solution of the problem.

The decision of the Court of Appeals is in direct conflict with the decision of this Court in the *Boquillas* case—only there water was involved, here oil is involved.

CONCLUSION

Respondent, while arguing forcefully the question of public policy as to why Petitioner should not ultimately prevail in the Supreme Court of the United States, presents no reasons or cases why Petitioner's rights and those of the People of the United States, which are inexorably joined in this case, should not be heard and determined by this Court on an issue involving the right of ownership by the United States of a billion dollars' worth of oil land.

Certainly a vast economic value is involved.

Certainly the rights of the public are directly concerned.

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[1] "Fiat Justicia Ruat Coelum". "Let justice be done, though the heavens should fall". 25 C. J. 1086, p. 63.

Certainly the issue has never been decided before this case by any Federal Court.

Certainly the people's rights in this vast property have never been presented to a Federal Court before this case.

Certainly such rights and its important legal questions should be presented and passed upon by the Supreme Court of the United States.

That petitioner should present it, rather than the attorney general, is anomalous. But this Court has before it a question of great importance which it should hear and decide regardless of who presents it. As Justice Jackson once said—the United States always wins, even when it loses. In this case it would upon losing, win a billion dollars worth of property which it rightfully has always owned. This Court has the right and duty to so declare.

The Supreme Court has heretofore taken jurisdiction in similar "land" title disputes to clarify the law thereon. The following constitute examples:

Perfecting title to Missouri grants:

Chouteau v. Eckhart, 2 How (43 U.S.) 344, 11 L. Ed. 293.

French and Spanish grants:

Doe v. Eslava, 9 How (50 U.S.) 421, 13 L. Ed. 200.

Validity of patent for lands:

Bell v. Hearne, 19 How (60 U.S.) 202; 15 L. Ed. 614.

Title to lands:

Berthold v. McDonald & McRee, 22 How (63 U.S.) 334, 16 L. Ed. 318.

Public Land laws:

Sylvester v. Washington, (215 U.S.) 80; 54 L. Ed. 101;

Tidelands case, 332 U.S. 14 (supra).

Petitioner therefore respectfully urges that it is the duty of this Honorable Court to hear and decide the great public questions involved in this case. Construction of both treaty and statutes of the United States are involved. (28 U.S.C. 1257(3).)

Petitioner urges with equal respect that such duty be recognized by granting the Petition for a Writ of Certiorari as prayed for herein.

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